UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES JOHNSON,

Plaintiff,

v. 23 Civ. 2441 (KPF)

CLEARVIEW AI, INC., *et al.*,

Defendants.

Conference

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New York, N.Y.
April 2, 2025
12:20 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

BERNARD V. KLEINMAN
Attorney for Plaintiff

GORDON REES SCULLY MANSUKHANI LLP
Attorneys for Defendants
BY: MALLORY J. BENNER
RONALD A. GILLER

(Case called)

THE COURT: Mr. Johnson, is there something wrong with the courtroom that causes the need to wear sunglasses, sir?

MR. JOHNSON: Yes. I have Fuchs disease, your Honor.

THE COURT: All right. Does that explain why you were 20 minutes late for the conference today?

MR. JOHNSON: It does. I got the last train after meeting with some people, and got the last train and got here. And it's very hard to see in New York. It's a very difficult city to navigate when you're not from here, especially with bad vision.

THE COURT: This conference has been scheduled for a while. There's really no reason for you to be this late for it, sir.

MR. JOHNSON: OK. Sorry.

THE COURT: Not looking very sorry.

All right. Mr. Kleinman, I'm taking appearances now.

MR. KLEINMAN: I'm sorry. Bernard Kleinman, on behalf of Mr. Johnson.

THE COURT: All right. Thank you.

MR. KLEINMAN: Thank you, Judge.

THE COURT: Mr. Giller and Ms. Benner.

MS. BENNER: Good afternoon, your Honor. Mallory Benner, from Gordon Rees on behalf of defendant Clearview.

THE COURT: Thank you so much.

MR. GILLER: Good afternoon, Judge. Ron Giller, also on behalf of the defendant.

THE COURT: Thank you.

As between the two of you, to whom should I be directing my questions?

MS. BENNER: Me, your Honor.

THE COURT: Thank you so much.

Can I ask you to remain standing, Ms. Benner.

Ms. Benner and then Mr. Kleinman as well, thank you.

Ms. Benner, there are three issues on the docket for today.

MS. BENNER: Correct, your Honor.

THE COURT: And the first is the issue of sanctions.

MS. BENNER: Correct.

THE COURT: And the second is the issue of discovery.

MS. BENNER: Correct.

THE COURT: And the third is the issue of a possible motion to dismiss.

MS. BENNER: Correct, your Honor.

THE COURT: From your perspective, is there anything else that I should be addressing with the parties today?

MS. BENNER: No, your Honor.

THE COURT: Mr. Kleinman, sir, from your perspective, are there other things I should have on the agenda today?

MR. KLEINMAN: My client wishes to make a statement,

as he has in the past.

Of the three issues that you mentioned, those are the three legal issues that I think are before the Court -- my request to file a 12(b)(1) motion and the two discovery issues, Judge.

THE COURT: OK. And your client wishes to make a statement when, sir?

MR. JOHNSON: As soon as possible.

MR. KLEINMAN: As soon as possible. Now or when we're done, Judge.

THE COURT: All right. I'll let him do it now.

Please bring the microphone closer to you, sir --

MR. JOHNSON: Sure.

THE COURT: Go ahead, Mr. Johnson.

MR. JOHNSON: Do you need me to stand, or be seated's fine?

THE COURT: I'll let you be seated if you're having difficulty --

MR. JOHNSON: Thank you.

THE COURT: -- with your vision and other things.

MR. JOHNSON: Yes. So thank you for your attention today, and please accept my apologies. It's been a lot, this whole -- this whole thing has been a lot.

So since we last saw one another, a lot of things have happened at Clearview.

THE COURT: I'm going to ask you to slow down just so the court reporter and I --

MR. JOHNSON: Oh, of course.

THE COURT: Thank you.

MR. JOHNSON: Yeah. Sorry. Sorry.

THE COURT: Yes.

MR. JOHNSON: So since we last saw one another, a lot of things have happened at Clearview, which, to my mind, substantiate that I'm not a cofounder of the company. The CEO has abruptly departed, and I'm sure you're aware of the recent judicial ruling in Illinois that makes it appear that I'm not and likely was never involved in the company beyond as a mere investor. It really doesn't matter what I think my role within the company is because if I were a shareholder, wouldn't I be included among the list of people responsible for Clearview's malfeasance, like in the Illinois case? But I'm not included on that list. So I'd like your Honor's judgment on this matter because it's a bit -- it's a bit confusing, to be honest, to have one courtroom going in one direction and another going in another.

So, you know, I've gone through a lot of things over the years. I've had a lot of conversations with people about this case. And after a lot of consultation, I think it's clear that Clearview was right not to see me as a cofounder. I mean its real cofounders told The Washington Post, and many other

reporters for that matter, that I was never involved in the company. And that's not strictly true.

THE COURT: Slow down, please.

MR. JOHNSON: Oh, sure. Forgive me.

That's not strictly true, because I was a shareholder and I did help the company raise money. But I did that on certain expectations that were not really true. They're not really borne out. And I think that explains -- just, like, logically I think that explains why I wasn't really able to sell the products, because the agreement that we had really wasn't really a real agreement. So I'm left with one of two conclusions: Either I am a cofounder, in which case I should be included on that list of people responsible for Clearview's malfeasance, which would be really terrible for me given that I had no role in the day-to-day operations of the company.

THE COURT: Slow down, please, sir. Thank you.

MR. JOHNSON: Sure.

Or I'm not one. And then it raises a lot of questions about, you know, the -- my own communications with the company, because if I'm -- you know, if I'm communicating with the company based upon wrong assumptions, or some might even say lies, about my status within the company, then it's really unfair to the people who I've communicated with because they're being compounded in that lie. You see?

So does that make sense?

THE COURT: Well, in part. I want you to understand what you think it does for this case, sir.

MR. JOHNSON: Well, I think it's extremely -- it makes it either makes it extremely complicated or extremely simple, so -- obviously that's up to your Honor's judgment, but you did ask me my opinion.

THE COURT: No, I didn't.

MR. JOHNSON: Oh, sorry.

THE COURT: Let me be more specific.

MR. JOHNSON: Yeah, sure.

THE COURT: Your counsel advised me that you wished to speak to me.

MR. JOHNSON: Yes.

THE COURT: I have let you speak to me.

MR. JOHNSON: Yes.

THE COURT: You've spoken about an Illinois case that is not my case.

MR. JOHNSON: Yes, ma'am.

THE COURT: You've spoken about the possibility or the concern about inconsistent findings, perhaps, among the courts.

MR. JOHNSON: Yes.

THE COURT: And I want to understand why you are speaking to me this morning about the Illinois case and why you are speaking to me this morning about the topics on which you're speaking. I'm imagining that there's going to be "and

therefore, X."

MR. JOHNSON: Oh, OK.

THE COURT: So --

MR. JOHNSON: Sure.

THE COURT: And therefore, what?

MR. JOHNSON: And therefore, it seems to me that the judge in the Illinois case -- this case came out a few days ago. It's fairly lengthy. I finished it last night, finished reading it last night.

I think the logic of that case means that I'm not a cofounder, and so if I'm not a cofounder, then certainly I can't enter into promises with people or business relationships with people if I'm not a cofounder. Right? Just logically.

MR. KLEINMAN: Judge, if I may intercede here for a moment?

THE COURT: Yes, sir.

MR. KLEINMAN: Thank you, your Honor.

I think also I wasn't aware of this Illinois case, and I haven't read the decision.

THE COURT: Were you aware that your client was going to speak about it this morning?

MR. KLEINMAN: Yes, I was. OK?

THE COURT: OK.

MR. KLEINMAN: I have not read the decision, but I mean there's also -- if there was a decision in Illinois, in

the district court, that found that Mr. Johnson was not a founder or not a principal of Clearview, then there are questions that I would need to look into -- whether the contract that he executed with Clearview, which is the basis for this litigation, whether he even had the capacity to enter that contract, and if he did not have the capacity to enter that contract, then I don't know. There may be questions about whether there would be a basis for him breaching the contract because he never had that capacity to begin with. So I mean I'm working kind of in the blind here, Judge.

THE COURT: Yes.

MR. KLEINMAN: I think maybe we all are. But I don't know what that decision was, and I'm not sure how it would impact this litigation. When I raised the issue --

THE COURT: Just one moment, please, sir.

MR. KLEINMAN: Yeah, sure.

THE COURT: Obviously your client's claims are withdrawn. It wouldn't change them. They're not being reinstated. What you're suggesting, sir, is it would impact the resolution of the counterclaims.

MR. KLEINMAN: Absolutely, Judge, because that's purely based -- the only claim there was breach of contract. There's no other claim in that counterclaim. It's a one-count breach of contract. If my client never had the capacity to enter that contract to begin with, then there's no way he could

have breached the contract, because from the beginning, the contract would have been void *ab initio*. But I don't know. I haven't briefed this. I don't know what the law is. I don't know if the law is different in Illinois or New York, or wherever. But I just -- I'm just raising this as an issue that is -- just came upon me, and I just, just want to just give you some sense of what my position may be. OK?

THE COURT: Sir --

MR. KLEINMAN: I'm not committing myself.

THE COURT: No. That's obvious. Yes.

All right. Thank you.

Mr. Johnson, was there something you wanted --

MR. JOHNSON: Yes. It's terribly confusing, because if -- if your Honor is not in agreement with the other judge, whom I don't know -- I've never sat before her; I've never spoken to her. If, if you're in conflict, I don't know what to do, your Honor.

THE COURT: All right.

MR. JOHNSON: I mean it's very confusing, and I've been trying to figure it out. And it leads to stress, which triggers Fuchs. So this is why I'm kind of stuck here, if that makes sense.

THE COURT: I understand.

MR. JOHNSON: OK.

THE COURT: I understand that that's your position.

Thank you.

Ms. Benner, do you want to be heard on this issue?

MS. BENNER: Yes, your Honor.

THE COURT: OK.

MS. BENNER: Your Honor --

THE COURT: And I'll ask you the same thing. For court reporter and judge, everyone please speak slowly and clearly because the courtroom acoustics are horrible. Thank you.

MS. BENNER: Thank you, your Honor.

THE COURT: Thank you.

MS. BENNER: I mean, first and foremost, this is not before the Court. This is the first time we're hearing of this.

THE COURT: Are you aware of this decision?

MS. BENNER: No, your Honor.

THE COURT: And I am not either. I have not read it, because Mr. Johnson doesn't seem to realize I have 300 cases of my own, and therefore, I'm not focusing on the decisions of other judges. But certainly I will look into it. Had I been advised, perhaps, before this moment, I would have looked at it. So you don't know whether it applies or doesn't apply or how it applies to this case.

MS. BENNER: No, your Honor, but at the same time, you know, it's our position that it would be irrelevant anyway.

This is a contract between the parties that Mr. Johns entered into in his individual capacity. There's no reference to his status as a cofounder or, you know, his involvement with Clearview in the contract. It clearly states that he's --

THE COURT: Slow down, please.

MS. BENNER: It clearly states that he's entering into the contract in his individual capacity. So we don't see how it's relevant whether or not he's a cofounder and how that has an impact on the counterclaims in this case.

THE COURT: All right. I understand that. And I'm sure the folks at the front table hold a different view, and I understand Mr. Johnson's view is one of trying to prevent inconsistent findings, which I do understand.

All right, Mr. Johnson, sir, you know the most about this case than any of this. What is the caption of the case, please? Do you know the name of the case, the Illinois case?

MR. JOHNSON: I'm unfamiliar, but it's Judge Coleman, is the woman's --

THE COURT: All right.

MR. JOHNSON: It's Sharon Coleman, and it's *ACLU v. Clearview*.

THE COURT: *ACLU v. Clearview*.

MR. JOHNSON: It's a Northern District of Illinois, and I've read it twice. I'm not a lawyer. I -- you know, I took common law, barely. You know, I don't know. Forgive me.

THE COURT: But, sir, you have an attorney.

MR. JOHNSON: Yeah, for -- obviously. But I've had it looked at by a lot of friends who are attorneys and I've had it -- I mentioned it to Bernie the other day. It just came out a few days ago, your Honor. There's a lot of things going on in it, from what I understand. It's been written about a lot in the media and analyzed, so it's --

THE COURT: I guess what's confusing to me, sir -- and of course, we'll find the case and be looking at it -- is how the ACLU would be filing a lawsuit as to which your status or not as a cofounder would matter.

MR. JOHNSON: Oh. This is why, your Honor. This is, as I understand it, and forgive me if I'm mistaken, but this is what I understand of it.

So the company is in trouble for a number of malfeasance issues when it comes to breaking the law in terms of privacy, being generally dishonest, some might even say lying about other --

THE COURT: You realize everything you say, sir, brings you closer and closer to sanctions.

MR. JOHNSON: I'm well aware. I'm just repeating what is in -- from my interpretation of what's there.

THE COURT: I'm not sure the word "malfeasance" is there. Is that in the decision?

MR. JOHNSON: I think it is, your Honor, but I'm not

100 percent sure.

THE COURT: OK. We'll be looking for it.

MR. JOHNSON: Maybe we should all read the decision and come back. Or I don't know, but --

THE COURT: All I'm saying is be careful how you interpret things.

MR. JOHNSON: OK. So let me -- can I step back a second?

THE COURT: Please.

MR. JOHNSON: OK. So if it is true that a company -- this is hypothetically. If a company is in trouble with violating certain aspects of the law and certain aspects of being truthful, then it stands to reason logically that they might be not truthful in other matters as well. And maybe one of those things that they're truthful on is whether or not I was actually even able to enter into that contract in the first place.

Do you follow my logic?

THE COURT: I do, sir, except once again, I can see a world, a hypothetical, in which a lawsuit is brought against Clearview but not against its founders. And therefore, I'm not sure that that lawsuit resolves fully and finally the issue of who the founders are or resolves the issue of your capacity to contract as a cofounder of Clearview. But your colleagues at the back table said to me that you entered into the contract in

your individual capacity.

MR. JOHNSON: Right, but based upon the assumption that I was, in fact, a cofounder.

THE COURT: But if it doesn't say that, I don't know why -- that's what they're saying, and I'll have to look at the contract --

MR. JOHNSON: Yes.

THE COURT: -- is that it was done, again, in your individual capacity.

Just one moment, please, because I'm looking at it right now.

The decision is *In Re Clearview AI Inc. Consumer Privacy Litigation*. I see it's Northern District of Illinois, case No. 21 Civ. 135, document 631, issued March 20, 2025. I don't mean to make folks wait here, but let me just look at this for a moment, please.

It is a class action settlement. In this action, Mr. Ton-That and Mr. Schwartz are listed as the cofounders, and Mr. Johnson is not listed as a defendant in this.

The word "malfeasance" is nowhere found.

MR. JOHNSON: Forgive me.

THE COURT: Ms. Noriega, could I trouble you to print out a copy for the front table and the back table, please.

I won't make you all read it, but I'm glancing at this right now. What I understand this to be, and I could be proven

wrong, is this is a final settlement of a class action. It's the fairness hearing and the inquiry that one makes as part of the settlement of a class action. I don't know, but I would be surprised if there are actually findings about misconduct on the part of Clearview, because often, class actions of this type -- and it's about access to biometric data. Certainly I'm not seeing anything about foreign powers having an influence in this, but to me, it's the fairness inquiry that I do when I do a class action settlement.

For those of you who do not do these things, there are factors regarding the fairness of the settlement and then there are also factors regarding the fairness of an attorney's fee award. That's what I'm seeing. I'm not sure.

MR. JOHNSON: As I -- if I --

THE COURT: Thank you, sir.

Mr. Johnson, I'm not sure it is dispositive of the issue of whether you were or were not a cofounder. I just don't know that. But OK.

We're talking about the same decision; yes, sir?

MR. JOHNSON: Yes, we are.

THE COURT: All right. I understand, and I'll give everyone a copy. I don't think -- it might impact Mr. Kleinman's discussion with me about the motion to dismiss he wants to file. Maybe. I don't know, but we'll talk about that.

Let's move on to some other things. Mr. Johnson, again, do I have everything you wanted to tell me about this case?

MR. JOHNSON: Yes, ma'am.

THE COURT: OK.

MR. JOHNSON: If I may, just one final point, if that's possible?

THE COURT: Yes, sir.

MR. JOHNSON: Well, it follows -- as I understand it, this is a very unusual, novel application of the law. And from what I read online about it -- forgive me. I'm -- again, I'm not an attorney. You know, from -- but from what I understand, and I've even taken it to, as I said, other attorneys and they, too, are kind of -- that it's a very novel application of rules around biometrics and tort law or in terms of class actions. And you'll notice that in this particular case, from what I understand, and I could be wrong about this -- again, I'm not an attorney, but from what I understand, is that it's a very novel case, and so because of that, I'd like to have it looked at even more, given what implications it may have for this case. And it seems to me that it likely would have some applications to this case, because it seems likely that the two cofounders -- I think they're named defendants in this, but I could be wrong on that.

THE COURT: OK.

MR. JOHNSON: And if they are, then it raises a lot of interesting questions about this case and about how other things are going to be paid for and, you know, all that.

THE COURT: But there is no admission of fault by Clearview in this case. Correct?

MR. JOHNSON: I don't know.

THE COURT: I don't see one. It's a settlement, but I don't see that there's an admission of liability. I don't see that Clearview's saying we did wrong, and so I'm not sure.

I think we should stop at the moment hypothesizing at the moment about how it might impact this case until everybody gets to read it carefully, including the judge. You are of the view that it might or indeed that it does. Your attorney would like to know. The folks at the back table would also like to know. I'm not sure, therefore, that it's useful to talk about its applicability today --

MR. JOHNSON: Sure.

THE COURT: -- because I'm not going to take a break to have us read it. So let's move on with other things.

MR. JOHNSON: Thank you, your Honor.

THE COURT: All right.

Ms. Benner, returning to you, please, on the issue of sanctions, I have the letters that I have, and I don't really -- if more has happened, I guess I want to know. If more has not happened, I want the briefest of arguments,

because you've already given it to me in writing, and I don't want to waste everyone's time just repeating what's already in writing, not to suggest time is being wasted.

Go ahead, Ms. Benner.

MS. BENNER: Sure, your Honor.

As far as we know, since our submissions, there hasn't about this anything else that's brought to our attention, so as of now, that's all we have. But with that, I know your Honor's well aware, as we discussed at our prior conference, the Court has inherent authority to issue sanctions for bad faith conduct in this case. And here, plaintiff is clearly acting in bad faith. He's intentionally violating court orders by placing false harassing statements about defendants as well as defense counsel.

THE COURT: Is my only basis inherent authority, or do I have anything from the Rules of Civil Procedure?

MS. BENNER: Your Honor --

THE COURT: I'm just asking. I don't know. I'm asking this, and this isn't a rhetorical question. I don't know that this is a situation where Rule 37 would come into play because it's somehow related to discovery.

Your view is it's inherent power.

MS. BENNER: Your Honor, with respect to these statements, I believe it's just on the basis of inherent authority, but there is the issue of sanctions for failure to

comply with discovery that we'd like to address, as I'm sure your Honor will address later in this hearing. But for the purposes of just these statements, we're just going off of inherent authority at this point.

THE COURT: All right. In the Rule 37 context, there is a case that I know of -- that is, *Agiwal*, and that tells me to consider the willfulness of the noncompliance, the efficacy of lesser sanctions, the duration of noncompliance and the warning of consequences of noncompliance.

In the inherent powers context, is the analysis different?

MS. BENNER: It's the same, your Honor.

THE COURT: It's the same. OK.

All right. So is that it on the issue of sanctions? I didn't mean to cut you off.

MS. BENNER: No, no. It's OK, your Honor.

The only thing I just would like to note is I think your Honor made very clear, especially with comments about defense counsel, your Honor had told plaintiff, in person, that any comments about defense counsel, no matter how benign, the Court would take as a threat to intimidate and undermine the Court's orders. And despite that being clear two months ago, plaintiff did just that, and the comments were far from benign, as I'm sure your Honor saw.

So we're here again today to request sanctions. This

conduct has gone on for two years now, and despite multiple warnings, in-person conferences, at this point we think there's nothing left to do but to issue sanctions in this case.

THE COURT: All right.

Mr. Kleinman, you disagree.

MR. KLEINMAN: Well, I think as far as the issue about any comments that Mr. Johnson may have made, I'm not sure if any of them go beyond the point of him merely expressing opinions which have already been made by third parties, like Bloomberg Business, and so forth, about Clearview. I don't recall if there were any specific comments about Mr. Giller or --

THE COURT: "Giller is really mad that I've been very politely but very firmly refusing to be gagged by him and his firm. What part of 'I won't be gagged when I'm whistle-blowing about a corrupt foreign-backed company' do you not get? God, take the L, man."

MR. KLEINMAN: Take the what, Judge?

THE COURT: "Take the L," the loss.

MR. KLEINMAN: Oh, oh. OK.

THE COURT: Take the L.

MR. KLEINMAN: Oh, I'm not --

THE COURT: You've got to be in on --

MR. KLEINMAN: -- up on the colloquialism.

THE COURT: That's to Mr. Giller; that's directed to

him.

MR. KLEINMAN: That is directed to Mr. Giller, but I don't know if it's --

THE COURT: "You should really withdraw from the case with what's left of your reputation, but I think we both know why you can't do that."

MR. KLEINMAN: You know, it's -- it's, it's not something that I -- that I would ever do. Or it's not something that a lot of people would do, but I think at the same time, it's merely a party to the litigation venting some frustration, and I don't know that there is any --

THE COURT: "Is Mr. Giller trying to throw the kitchen sink at me now? Perhaps on behalf of a foreign government? Gosh, I really hope not."

On behalf of a foreign government?

MR. KLEINMAN: Well, I don't know if he quite said it that way, Judge. OK? I still -- I can read it, but I don't know the --

THE COURT: Oh, please.

MR. KLEINMAN: -- intonation and so forth.

THE COURT: Don't. Don't. Don't.

MR. KLEINMAN: I just think --

THE COURT: To use your client's expression, "take the L."

MR. KLEINMAN: All right.

MR. JOHNSON: Your Honor, if I may?

THE COURT: No. You've said so much, sir.

MR. JOHNSON: Forgive me.

MR. KLEINMAN: No, but I don't know that those statements actually merit a, some type of a sanction, and if there was a sanction, I think there should be a -- sanctions should be given in a, different levels: If you violate this sanction --

THE COURT: Agreed.

MR. KLEINMAN: -- then you're, you know, you're going to get one whack. If you violate this sanction, then you're going to get 18 whacks, and a third sanction, you'll get heel holed.

THE COURT: Sir, we don't use that. OK?

Also, your client accused me of being part of a scam.

MR. KLEINMAN: Sorry, Judge?

THE COURT: And he's shaking his head now. He believes me to be part of a scam.

MR. JOHNSON: It's not your Honor's fault. It's -- if I may?

THE COURT: No. You've made your point, sir. You've accused me of using my office to perpetrate a scam against you. That seems bad. No. That's OK. That's what you wrote.

MR. JOHNSON: To be precise about it, if I can, a scam that you may not be necessarily -- you may be the victim of it

as well as I was.

THE COURT: Sir, I'm not nearly as stupid as you take me to be. I myself do not feel as though I've been misled by the defense team. I'm not part of anyone's scam.

MR. JOHNSON: Sure, but your Honor, we have many cases now that are coming out -- you have Theranos, of Biome, of WireCard -- in which counsel will sue. People are talking openly and publicly about fraudulent conduct on behalf of companies, and this is becoming a routine thing. It's something that's talked about all the time at the SEC, and it's a real concern, and so --

THE COURT: Mr. Johnson, where are your DHS agents? They don't exist.

MR. JOHNSON: Your Honor, there's -- I believe, your Honor -- and I checked on this -- there's over 300, 400 Alex Rodriguezes in the Department of Transportation alone. And in fact, I did --

THE COURT: You gave me Department of Homeland Security.

MR. JOHNSON: I did.

THE COURT: There was one. One, sir.

MR. JOHNSON: Well, this is what he told me after he and I spoke after this court proceeding last time. But I'm happy to give the phone number again, and you're free to call him.

THE COURT: He's not a real DHS agent. He's only --

MR. JOHNSON: No. No.

THE COURT: One of them doesn't work for DHS. The other one is effectively a security guard at an office.

MR. JOHNSON: No, your Honor. That's not -- that's incorrect. And I will tell you, and I'm happy to -- we can put them on the phone, you know.

THE COURT: Oh, no. I don't trust them enough to talk to them on the phone. You gave me names. I went to the top people at DHS, and they said they do not exist.

MR. JOHNSON: I don't think that's --

THE COURT: I went to DHS.

MR. JOHNSON: OK.

THE COURT: Sir, speaking of people being misled, it may well be you, but the two names you gave to me, one was not -- neither one was a DHS agent. One was not employed in any capacity at DHS.

MR. JOHNSON: Yes.

THE COURT: And the other was the equivalent of a security guard. He's not an agent of DHS and certainly would not have the power to be a handling agent.

MR. JOHNSON: I don't think that's correct, your Honor, but I'm happy to -- I'm sure it will come out, given that this is all on the record.

THE COURT: All right.

Mr. Kleinman, anything else you wish to say, sir?

MR. KLEINMAN: No, Judge.

THE COURT: Thank you so much.

Ms. Benner, anything in reply? It's fine if there isn't at this time.

MS. BENNER: Your Honor, just one comment I'd like to make.

Just the fact that, you know, Mr. Kleinman had made a comment that these could be Mr. Johnson's opinion, his statements. But your Honor made it clear, this is a court order, not to make any statements about Mr. Giller, and Mr. Johnson violated the court order. So in the interest of the fairness of this litigation and ensuring judicial integrity for this process, Mr. Johnson shouldn't be allowed to violate court orders.

THE COURT: All right. Thank you.

Ms. Benner or Mr. Kleinman, who wants to speak on the issue of discovery first?

MR. KLEINMAN: Ms. Benner can, Judge.

THE COURT: OK.

Ms. Benner, I believe the last thing I did was issue an order that said that Mr. Johnson had to comply with his discovery obligations. So where are we?

MS. BENNER: That is correct, your Honor, and since then we have received nothing.

THE COURT: And so my last order was, I believe, according to my notes, March 13 --

MS. BENNER: Correct.

THE COURT: -- is that correct?

All right. Now let me understand where the parties are right now. There was agreement as to search terms, but the search term review has not been conducted.

MS. BENNER: Correct.

THE COURT: From your perspective, what else are you anticipating?

MS. BENNER: Your Honor, we also -- plaintiff was supposed to give us supplemental responses to answers to interrogatories, the written RPFs, the RFAs, all of which --

THE COURT: Slow down, please. Thank you.

MS. BENNER: Sorry.

-- all of which were outlined in your January 16 order. So essentially all of the discovery that was ordered was not complied with.

THE COURT: All right.

Mr. Kleinman.

MR. KLEINMAN: Well, as far as the search terms, I received search terms from counterclaimants' counsel, and I did respond to those. OK? And I have questions about whether they were too broad or some of them were just too general, and I don't think any resolution was finally made as to what those

search terms should be.

THE COURT: Why I'm confused, sir, is that in the defense's letter of March 7, 2025, the note I have is that the parties reached agreement on the search terms but that there was an issue about performing the actual searches.

MR. KLEINMAN: Well, that too, also, the performing the searches. But there are questions that I had raised about some of the search terms that had not been resolved, as far as I'm aware.

THE COURT: Oh, excuse me, because I had been told that they have been resolved.

Just one moment, please, sir.

MR. KLEINMAN: Sure.

THE COURT: Thank you.

You'll excuse me while I fight with my computer.

Sir, docket entry 68, I believe, March 7, 2025, letter from Mr. Giller and Ms. Benner, in the second paragraph:

"The parties conferred and have agreed upon a set of search terms for plaintiff to use in searching for relevant discovery. However, plaintiff is now refusing to conduct these searches."

I don't believe he ever wrote in a letter saying, wrong, Failla, we do not have agreement. So I've been proceeding for the last month on the understanding that there was agreement.

MR. KLEINMAN: No --

THE COURT: Are you telling me there's not?

MR. KLEINMAN: -- anything indicating that the terms were agreed upon.

THE COURT: But you did receive this letter --

MR. KLEINMAN: Yes, I did.

THE COURT: The letter I did.

MR. KLEINMAN: Yes.

THE COURT: OK. Let me imagine then that the search terms have been agreed upon, because I wasn't told otherwise.

MR. KLEINMAN: I'm sorry to interrupt. Yeah, that's fine. We can say that that's the question. I think the question was more about actually effectuating those search terms --

THE COURT: Agreed.

MR. KLEINMAN: -- was more the issue. I know you issued an order, and I think you boldfaced it, that it was defendants' responsibility to make those -- search -- to fund that deep search.

THE COURT: Hold on. Hold on.

MR. KLEINMAN: Well, I may be paraphrasing.

THE COURT: Right, but --

MR. KLEINMAN: Look at memo endorsed. I think it's on ECF 80.

THE COURT: Sir, I'm looking at my endorsement of the

13th of March. It says, "plaintiff is ordered to comply with the Court's January 16, 2025, order. Further, the Court finds absolutely no basis for defendants to be forced to retain an ESI vendor."

MR. KLEINMAN: That's what I'm talking about, Judge.

THE COURT: Yes, but that's the point. That means you have to do it. They don't have to pay for it. It's got to come from you.

MR. KLEINMAN: I understand that, Judge.

THE COURT: OK. All right.

MR. KLEINMAN: Well, I understand that, Judge. It's got to come from the defendant Johnson. Got it.

THE COURT: No, sir. No, sir. There's a single plaintiff, who is your client, and a single set of defendants, who are the folks at the back table. So you had to comply and they don't have to pay for it.

Now, I'm fine if you agree to let them set up a separate team to review it so you don't have to. I believe that's what they offered to do, but I want to understand how this is going -- who is going to do this review? Because it was supposed to be done by the 14th of March.

MR. KLEINMAN: Right, and hasn't been done. I don't -- I mean if there is a separate team, then -- I mean I've dealt with this, for example, in the U.S. Attorney's Office, where there's a Chinese Wall created.

THE COURT: Yes.

MR. KLEINMAN: And they observe, that separate team has to observe certain requirements. And I haven't gone over the details with Mr. Johnson, so I'm sure that that is a possibility. OK?

THE COURT: Mr. Giller's giving me a strange face, so I don't want to misstate what they said to me. Give me a moment, please.

"Alternatively, if plaintiff's counsel would prefer to send us the hard drive, we will conduct the agreed-to searches."

I understood that to be with a taint team in place. I did not think that Mr. Giller and/or Ms. Benner were going to be doing the searches.

MR. KLEINMAN: I didn't -- I don't -- I can't make any assumptions.

THE COURT: No, of course.

MR. KLEINMAN: OK?

THE COURT: What I'm saying, sir, is we're here together, and somehow this material has to be reviewed and it has to be produced. You or your client has to do it.

MR. KLEINMAN: OK.

THE COURT: The question is how are you going to do it? And if the issue is you want to do it -- and we can talk to your friends at the back table and see if they would put a

taint team in place. Or if you just want to spend nights and weekends doing it yourself, that's fine by me, but it's got to be done.

MR. KLEINMAN: If you counted on me to do it, Judge, this case would go on a long time.

THE COURT: No, no. You think that, but I have ways.

Mr. Giller, perhaps I'm misconstruing your facial expression, sir. When you said that you would accept the hard drive and do the searches, what then did you mean?

MR. GILLER: Your Honor, I apologize if my facial expressions expressed anything other than disbelief to counsel, not from your Honor.

What we meant is if they're refusing to do the searches that you've now ordered them to do twice, we would take the hard drive and the entirety of the database and do the searches ourselves. We are not offering to pay anybody to do it, because we shouldn't have to, and we're not offering to have a separate team of people do it at my firm.

We are the ones with knowledge of the case and involved in the case. If we have to because there's no other way, because they're refusing to comply, then we'll do it.

THE COURT: I understand that. What I'm saying is --

Mr. Kleinman, it has to be done. Right? And I'm trying to figure out how it can be done. I'm uncomfortable, given that there may be attorney-client privileged information

going to you two in the back, but I believe you could teach somebody else in your firm to run searches with the terms and to print out the responsive documents and to exclude the attorney-client privileged stuff. I think you could do that. Is it a pain? Absolutely. Would it get done? Yes.

MR. GILLER: Your Honor, if that's what the Court directs, obviously we'll comply.

THE COURT: Well, what are my options? What are my options?

Mr. Kleinman, what else is there to do?

MR. KLEINMAN: If my client can end up hiring a third-party ESI firm to search using those search terms, I assume that would be acceptable. I don't see any reason why not.

THE COURT: That would be acceptable. Yes, but I thought the point was that there were financial constraints --

MR. KLEINMAN: There are financial constraints, obviously.

THE COURT: OK. But he's still willing to do that?

MR. KLEINMAN: I believe that it depends upon what the cost would be, but I did not have a discussion with him and might recommend that at the Court's direction.

THE COURT: Mr. Kleinman, it's already due. Everything is already due. There's no excuse for this not to have been produced. So I don't know. I feel like it's a

little late in the day for him to be saying maybe he should consider it and have a third-party ESI. Give me other options, because right now you're in complete violation of my order.

MR. KLEINMAN: I understand that, Judge.

My client said that he would be willing to -- he will hire an ESI firm and that they will get the documents, the drive that I received from Alston & Bird, and they will use the search terms that were agreed upon and provide that discovery.

THE COURT: Let me please ask this, and I'm asking this of both sides. This idea of these ESI firms, it's not something I did in practice and it's not something I've seen as a judge. Are we talking about contract attorneys?

MR. KLEINMAN: No, no.

THE COURT: Are we talking about tech wizards? What is the ESI -- I don't know what their competence is to do this.

MR. KLEINMAN: The firms, I've dealt with a firm like this in a case in California, where they got massive amounts of emails and documents. They were given these search terms and then they produced the documents in a manner, and format that would be acceptable under the federal rules. This is what they do for a living.

THE COURT: Of course, sir. How do you make sure that privileged information isn't disclosed? Do you get the first cut?

MR. KLEINMAN: Yeah.

THE COURT: Does it go to you first?

MR. KLEINMAN: Right. They would give me the first cut. I would review it, make sure it didn't include any documents -- part of the instructions would be, for example, that any communications between Mr. Johnson and his prior counsel and Mr. Johnson and myself would obviously be excised, because they'd be subject to privilege. But any communications, for example, that fit within -- they were parameters of emails between Mr. Johnson and Mr. Ton, for example. OK? Where there was -- they were not privileged, but those would be available. Those would be provided.

THE COURT: All right.

Ms. Benner, your response.

MR. GILLER: If I may, your Honor?

THE COURT: Sir.

MR. GILLER: First, we're interested to hear that they now agree that there were these search terms, because there weren't.

THE COURT: Well, as far as I'm concerned, I've already told Mr. Kleinman it's too late to tell me there wasn't agreement.

MR. GILLER: OK. I just have two things about what was just said.

One is we would like the ability to know in advance which ESI firm they're proposing, and we're not going to object

to any -- any of a number of companies that do this for a living. We work with many different companies. I don't have any preference. I just want to make sure it's a legitimate company that does discovery ESI for a living. That's my only request with respect to that, that it's not some type of business that does something else and is doing this as a favor or a friend, or something else.

That's my first point. My second point --

THE COURT: No, no. We'll take your first point.

Mr. Kleinman, any objection?

MR. KLEINMAN: Mr. Giller has said that his firm's dealt with a number of ESI third parties that do this. If he wants to provide me with three or four that his firm has used, we can eliminate that problem. I'm not asking my brother-in-law or my wife to do this.

THE COURT: OK.

MR. KLEINMAN: I don't know if that was the inference, but I did ask --

THE COURT: No, no. There was no inference. There are firms he knows and firms he doesn't know. I'm sure he can give you a list of many firms.

MR. GILLER: Judge, this afternoon, I'll send an email with three names.

MR. JOHNSON: I would not feel comfortable with that, your Honor. I would like to use whatever the standard one that

is used by the courts.

THE COURT: There is no standard one.

MR. JOHNSON: If there's a list of them, I think the list should be jointly provided.

THE COURT: By whom, sir?

MR. JOHNSON: By us and by opposing counsel.

THE COURT: Mr. Kleinman may know the one he used in California.

Do you remember it, sir?

MR. KLEINMAN: Well, I remember the individual. I remember the individual I dealt with. I mean I'd have to get back in touch with him, and if he's still doing this. They've been doing this for a long time. This firm's been doing this for a long time.

THE COURT: Mr. Johnson, I'm confused. Your counsel suggested, requested the three. Now you're saying no.

MR. JOHNSON: No, no. With respect, your Honor, I'm sure there's lots of firms that do that. I'm not, I do not feel comfortable with having opposing counsel make that list of firms. I'm happy to use standard firms that are out there that are maybe not the list that Mr. Giller provides. But I'm happy to -- you know, I'm sure that there are ones that are out there that may not necessarily be on his list. There could be 10, 20, 30, 40 firms. I'd like to do some research before I'm comfortable agreeing to any firm.

THE COURT: Then, Mr. Kleinman, Mr. Giller will get a right of first refusal. You'll have to tell him who it is, and if it's not a firm that was considered to be reputable, he'll oppose and you'll bring it to me and I'll decide.

MR. KLEINMAN: Your Honor, I will provide that list to Mr. Giller, and if anything -- the same thing as choosing a mediator, an arbitrator.

THE COURT: Right.

MR. KLEINMAN: You get three. You choose one of them, the one that you agree upon. That's the one you use.

THE COURT: Yes, I still think Mr. Giller should send a list, if he would indulge me, because it might help the process.

MR. KLEINMAN: Yeah, Judge. In fact, it probably will help the process, because if it's a large firm that I've dealt with in the past or I'm familiar with, then -- you know, I mean, I don't think I would have a problem with it.

THE COURT: All right. But we know it's not your brother-in-law. Thank you.

MR. KLEINMAN: No, it's not.

THE COURT: Mr. Giller, what's your second point?

MR. GILLER: My second point is just with respect to privileged materials, your Honor. I would just ask that if they're going to claim documents that are found using the search terms, that they provide us with a privilege log at the

same time.

THE COURT: Agreed. Anything that's removed will have to be logged. Yes, I agree with that.

MR. GILLER: Thank you, your Honor.

THE COURT: All right. That's the discovery -- well, partly.

Mr. Kleinman, that only gets us to the issue about the production of ESI for which the search terms are hits. What about the supplemental responses to the interrogatories, the requests for admission, the requests for production?

MR. KLEINMAN: I sent that request. I sent the -- I'm sorry. I sent the -- I sent all the documents, the original demands from Clearview's counsel and your order, and so forth, to my client. I never received a response, Judge.

THE COURT: Hmm, that seems bad.

All right. You do understand -- you do understand, sir, because I know you've been here before; I know you've been in this courthouse for decades -- that court orders should be followed, right? You know that.

MR. KLEINMAN: Yes, I do.

THE COURT: Yes. Why can't my orders be followed, sir?

MR. KLEINMAN: I'm just the lawyer, Judge.

THE COURT: No, no, sir. Ultimately you're on the hook for this. Where are these responses, sir?

MR. KLEINMAN: I asked my client to provide responses. He did not provide the responses.

THE COURT: But is it not on you to cajole him, to pressure him, to persuade him?

MR. KLEINMAN: I sent him more than one email reminding him of his obligation, Judge.

THE COURT: OK. So this is the basis for sanctions under Rule 37. OK. I understand. I just think it's unfortunate. OK. Thank you.

Mr. Kleinman, actually, before you sit down, I think we're moving now to the third topic, which is your motion to dismiss.

Sir, I've understood, and I recently had to look into this for another matter, that a statement in a pleading of an amount in controversy in excess of $75,000 is presumptively correct. So I don't know how you'd be able to rebut that presumption in a 12(b)(1) context. Separately, I'd like you, please, to respond to your adversary's contention that, in fact, their compulsory counterclaim receives supplemental jurisdiction by being a compulsory counterclaim.

MR. KLEINMAN: May I address those?

THE COURT: You may, please. Thank you.

MR. KLEINMAN: OK.

Merely stating and pleading what's in 1332(a) is not sufficient under the cases that have been cited in this

circuit, Judge.

THE COURT: The case that I'm looking at, sir, is *Scherer v. Equitable Life Insurance Society of the United States*, 347 F.3d 394 (2d Cir. 2003), that a statement of an amount in controversy in excess of $75,000, there's a rebuttable presumption of a good faith representation.

MR. KLEINMAN: Judge. If I can quote, it says, the party invoking the jurisdiction of the federal court has the burden of proving that it appears to a reasonable probability that the claim is in excess of the statutory jurisdictional amount, *Security Plans Inc. v. Cuna Mutual Insurance*, 769 F.3d 807, 814 (2d Cir. 2014). Where the plaintiff alleges damages in a sum that exceeds the sum or value established by --

THE COURT: Slow down. For court reporter and judge, please slow down.

MR. KLEINMAN: I'm sorry.

THE COURT: Thank you.

MR. KLEINMAN: "Where the plaintiff alleges damages in a sum that exceeds the sum or value established by 28 U.S.C. Section 1332(a), exclusive of interests and costs and is lacking in additional details to support this assertion, it constitutes a conclusory reference to 28 U.S.C. Section 1332(a) and fails to adequately establish that the amount in controversy exceeds $75,000." That's *Dawkins v. Carmack*, 2023 U.S. Dist. LEXIS 35313 (S.D.N.Y. Mar. 2, 2023).

I have three other cases that say exactly the same thing -- that merely repeating that it will exceed 75,000 is not sufficient under the statute. Otherwise, everyone would be in this courthouse. You won't have 300 cases, you'll have 3,000, because people will realize all they need to do is regurgitate the statute.

THE COURT: Of course, but I think one of those cases that you were suggesting said if it was reasonably apparent from the face of the complaint that the damages were in excess --

MR. KLEINMAN: They're both --

THE COURT: They're going to suggest that want more than $75,000 in damages for their counterclaims.

MR. KLEINMAN: I have no doubt they want more than 75,000.

THE COURT: I understand what you're saying. Could you turn, please, to their argument that their counterclaim is a compulsory counterclaim, and therefore, I have supplemental jurisdiction.

MR. KLEINMAN: Well, first of all, their compulsory counterclaim is based on Rule 13, and since there is no more claim for my client, I don't know that Rule 13 applies anymore, because his claim was completely dismissed.

THE COURT: There are multiple cases at page 2 of their letter of March 20, 2025, showing that I retain

supplemental jurisdiction even if plaintiff's claims are dismissed.

MR. KLEINMAN: Also, Judge, there is -- if you read their complaint, their counterclaim complaint --

THE COURT: Yes.

MR. KLEINMAN: -- the only time they mention damages that they suffered is in their conclusory statement that it exceeded $75,000. They don't say we lost business. They don't say that we lost a contract with XYZ. They merely say that it will be proven later on. And Judge, you know what rules are. The issue of subject matter jurisdiction can be raised at any time at all. There's, I believe, case law that says even after verdict you can raise it, because if the Court doesn't have jurisdiction, the Court doesn't have jurisdiction to begin with.

THE COURT: Yes.

MR. KLEINMAN: And if look at their complaint, there's no place in this complaint where they say as a result of Mr. Johnson's breaching the contract clauses, we lost a contract with ABC or something else happens specific that caused our damages in excess of $75,000. And I, too, Judge, have been in front of cases with a number of district court judges, and with all due respect, Judge --

THE COURT: Oh, please don't ever say that.

MR. KLEINMAN: Sure.

THE COURT: That usually is going to be followed by something suggesting a lack of respect.

Just finish. Go ahead, sir.

MR. KLEINMAN: With all due respect, Judge, I had a case recently in front of Judge Matsumoto, and the question arose about my client satisfying the jurisdictional amount. And she said, well, I'm not going to rule on that, but Mr. Kleinman, you'd better provide me with some proof or some offer of proof that the amount actually exceeded your client's, that the damages exceeded that, and my client had to provide some documentary proof to Judge Matsumoto that, in fact, the amount could exceed 75,000.

We have nothing whatsoever that's been offered here. And remember, all that's here is the, all that's here is the breach of contract claim. There's nothing else. There's no defamation, nothing else.

THE COURT: There is a defamation claim.

MR. KLEINMAN: That was withdrawn.

THE COURT: That was withdrawn.

MR. KLEINMAN: That was withdrawn. The amended complaint only has and the two clauses that are cited are the disclosure of the wind-down agreement and the clause about impugning the company, and so forth. Well, there's no evidence that says that, in the complaint that says as a result of Mr. Johnson's actions, which they delineated with 20 or 30

paragraphs, the -- you know, the Butte, Montana, police department didn't sign a contract with us or we were refused entry to some trade fair. Nothing at all. It's completely -- it's completely guesswork. It's not even guesswork. They're just throwing that in in order to invoke the jurisdiction of this court.

And Judge, I don't even know if they would have enough jurisdictional amount to prove, to be in Civil Court at 111 Centre Street, because all it is is that we did this and we lost business and that business exceeds $75,000. Well, in the meantime, this is costing everybody a lot of time and money -- your time, the Court's time, my client's time and money, their client's time and money. And there actually may be no damages at all, and all I'm saying is I wish to be able to make that motion in front of the Court. And if they can't provide any proof that they have or any plausible explanation as to how my client's actions exceeded $75,000 in damages -- that doesn't include attorney's fees, as you know -- then the case should be dismissed. And there's other courthouses they can go to. They can go to 60 Centre Street or 111, you know, or go to Small Claims Court, but there's a lot of other places besides this building and your Honor.

THE COURT: All right. Thank you.

MR. KLEINMAN: Thank you, Judge.

THE COURT: And the back table, Ms. Benner.

MS. BENNER: Your Honor, I just would like to focus back on that first argument that we made in our letter, that the fact that this counterclaim is a compulsory counterclaim and that the Court can retain supplemental jurisdiction to hear this counterclaim even though plaintiff's claims are dismissed. As we've cited numerous case law from this circuit in our letter, this is something that clearly can happen here, so I think the fact that plaintiff has kind of disregarded this argument should be considered by the Court, because that would be dispositive of this motion in and of itself.

Moving on to plaintiff's second argument, that we've not properly pled diversity jurisdiction under the law, first, Mr. Kleinman focused specifically on the counterclaims action, but he neglected to say that the Court can look at other documents as well. In our initial disclosures, which we included as an exhibit to our premotion letter, defendants specifically stated that based on Mr. Johnson's breaches, they suffered damage, harm to client relationships, investors. So when you take that in combination with the allegations in the complaint, where defendants make numerous examples and include exhibits of statements that Mr. Johnson made that did violate the wind-down agreement, clearly the amount in controversy has been pled.

I also want to frame for the Court, too, the position --

THE COURT: I want to pause for a second.

Mr. Kleinman is contemplating a 12(b)(1) motion. You're suggesting that this would not be a facial 12(b)(1) motion but fact-based 12(b)(1) motion, where I can consider not merely the complaint but rather other things.

MS. BENNER: Yes, your Honor.

THE COURT: I see.

MS. BENNER: Under Second Circuit law, we found that the Court can consider other things as well on this motion.

THE COURT: All right. Thank you.

Please continue.

MS. BENNER: Sure. So I think it's important to frame with the Court, too, the positions of the parties here. We're not talking about a small mom-and-pop shop here, where plaintiff may have made a few comments to, maybe, some small local news outlets or to people on the street. Clearview is a massive company that's known worldwide. They contract with -- actually, almost all of their clients are governmental agencies, police forces. And you have plaintiff, who was, you know, going around telling people that he was a cofounder, making these disparaging false statements about the company that clearly have the potential to cause significant damage to the company. You know, someone who maybe doesn't know the company's history or Mr. Johnson's involvement could take his comments at face value, saying, oh, you know, this gentleman

who is a cofounder is saying that this is a criminal corporation, the CEO is lying, you know, the company's not well run, a whole slew of things. So I think that is important to take into consideration in this counterclaim.

Mr. Kleinman also talks about how defendants did not name any, you know, specific harm in this case, that any investors lost or business opportunities, but I think it's important to note that, as I said before, my client's contracts are with government agencies. Their business is highly confidential. This isn't information that we would put in a public pleading or discuss at a public hearing. This information would be exchanged under a confidentiality order in the course of discovery. And as your Honor know, we're in the thick of discovery. We haven't engaged in any depositions, no experts. So you know, at this time --

THE COURT: There is no confidentiality order between the parties as of this moment.

MS. BENNER: We did enter into one.

THE COURT: There was? With the Alston & Bird firm or with Mr. Kleinman?

MS. BENNER: No. With Mr. Kleinman. I believe that was filed with the Court, your Honor.

THE COURT: All right. I heard you say it would be exchanged with a confidentiality stip, basically, but I thought there was one. OK. Thank you.

Go ahead.

MS. BENNER: There is one in this case.

So that's also a reason why that information was not included in the pleading. But as your Honor said at the beginning, you know, the defendant's burden for a pleading under diversity and the amount in controversy is hardly an onerous burden. All they have to show --

THE COURT: Slow down, please. Thank you.

MS. BENNER: -- is a reasonable probability that the claims made 75,000, and we clearly have done so here.

THE COURT: All right. Thank you.

Mr. Kleinman.

MR. KLEINMAN: Yes. Couple of things, Judge.

THE COURT: Yes.

MR. KLEINMAN: In the initial Rule 26(a) disclosures, the 26(a)(1)(A)(iii), computation of damages, all I got from defendants' firm was defendants are seeking damages due to plaintiff's breach of the wind-down agreement as set forth in defendants' counterclaim. Damages are based on harm to reputation as well as harm to business and client relationships. Defendants have sustained damages exceeding $75,000. However, the exact amount of damages are unknown at this time."

So in other words, the exact amount could be less than 75,000, because they're unknown.

THE COURT: Except they said we don't know what it is, we just know it's more than 75,000.

MR. KLEINMAN: Right. We don't know what it is, but we think it's above 75,000. OK?

THE COURT: All right.

MR. KLEINMAN: Also, as far as the argument that Clearview has secret agreements with other parties and they may have lost business, they could have filed anything under seal with the Court that would show that they've lost business as a result of this. Nothing was presented.

THE COURT: Sir, when you file your motion, they may choose to do just that.

MR. KLEINMAN: They may. I agree.

THE COURT: I want you to understand the skepticism with which I'm viewing your motion. I can't stop you from making it, sir, but I think they have a very strong argument with respect to the compulsory counterclaim argument. But OK.

MR. KLEINMAN: We'll see.

THE COURT: Go ahead.

MR. KLEINMAN: I'm sorry, Judge.

THE COURT: That's fine.

MR. KLEINMAN: I just want to finish my argument. OK?

There's case law that repeatedly says that allegations of damages, including conclusory statements that, quote, they have suffered damages in the form of litigation and trial

expenses and loss of income and damages to be set forth in the future are insufficient. *Maitland v. LAN*, 2017 U.S. Dist. LEXIS 40467, Eastern District of New York.

Also, as far as the issue about supplemental jurisdiction, in *Cohen v. Postal Holdings*, 873 F.3d 394, 399, Second Circuit discussion discussing Section 1367, said that supplemental jurisdiction is only available if the Court originally had jurisdiction. If you had no jurisdiction at the very beginning of this case, then their counterclaim can't bootstrap itself if their damages aren't less than $75,000.

THE COURT: I don't think they dispute that. Are you suggesting that your complaint, or is this going back --

MR. KLEINMAN: Well, he has no complaint anymore.

THE COURT: Please. That argument doesn't work.

MR. KLEINMAN: OK.

THE COURT: The argument is if I did have it, if I had jurisdiction when your client filed his complaint, then the fact that the complaint was withdrawn doesn't deprive me of jurisdiction.

I thought you were going elsewhere. What I thought you were going to say was given all the uncertainty about this Illinois decision, maybe your client didn't actually have a jurisdictionally filed the complaint. I just don't think that's going to work. But I understand that that might make its way into your argument; that's where I thought you were

going.

MR. KLEINMAN: Yeah. I haven't read the decision in Illinois. OK?

THE COURT: Yes.

MR. KLEINMAN: So I mean that is another issue. It would be, I think, something that would be -- it might be a 12(b)(1) because -- also, it's on the merits; it would be a 12(b)(6), I guess, that he didn't have authority to sign the contract to begin with, so if he had no authority to sign the contract -- but that's a matter -- I haven't looked into the issue, so I don't want to be bound.

THE COURT: You haven't read the decision yet. I understand.

MR. KLEINMAN: I haven't read the decision, and I want to research the law.

THE COURT: I hear you, sir. I cannot stop you from filing this motion.

MR. KLEINMAN: I appreciate that fact, Judge. OK? Because I don't make any assumption that judges can't do anything. OK? You could make an order, and then I got to follow it. OK? And honestly if you had done that, I would have asked for permission of the 1292 to file an appeal with the Second Circuit, because I really do feel, Judge, that their complaint was drafted so that it does not satisfy 1332(a). Merely saying our damages exceed $75,000 is -- does not satisfy

the statute and that if a motion under 12(b)(1) is made -- and I've had this before, maybe not before your Honor, but you've said a lot of other judges, and I like to say, just show me a little more. I'm not asking for the Encyclopedia Britannica, but just show me something that shows that there might've been a loss. Was there a contract canceled? Did you get kicked -- this case in front of Judge Matsumoto, my client showed me the contract's canceled and that the other issue -- it's happened in state court also, because I had a case in the, across, in front of, in Brooklyn, OK, Brooklyn Supreme, where there, as you probably know, they really never look at jurisdictional amount; you just have to plead it. But I mean the issue was raised, and I had to show to the judge that, wait a second, my client has had contracts canceled, you know, as a result of the actions of the plaintiff. And the judge said OK. So sufficient basis to show that his damages exceeded $50,000.

So I'm not asking for a lot here, Judge, but if they don't have anything that they can show, then it's purely conclusory, and I don't think that this Court has jurisdiction. And I think that we can all move on, the Court, myself and my adversaries, to another court. Or as my client has offered multiple times to settle this case.

THE COURT: All right. Thank you very much.

MR. KLEINMAN: Thank you, Judge. Thank you for the time, Judge.

THE COURT: Absolutely. I want to hear the full expression of your arguments, and I certainly haven't prejudged them, because I don't do that. I do want to go back, though, because I'm still bothered by the discovery issue.

Ms. Benner, you heard me speaking with Mr. Kleinman. You heard him say where things are with respect to what I'll call the supplemental responses category.

What do you want? And I say that as a declarative statement; there's no emotion in it whatsoever. What is it that you want? Do you want him to be sanctioned monetarily? Do you want a default judgment? Do you want me to find that he has admitted everything in these documents? What is it that you're seeking, please?

MS. BENNER: Sure, your Honor.

I mean the bare minimum, we definitely would like our fees for having to come to the Court now on multiple occasions to deal with these issues. As your Honor knows, we spent significant time on these issues a few months ago. We've had to write your Honor multiple times. We're here again on this issue. So at a minimum we would definitely like our fees paid.

We also would like the answer stricken. We believe at this point the plaintiff knows what his discovery obligations were. Your Honor was very clear. The order was clear. After we had a little bit of a dispute about him complying with the order, we wrote your Honor. Your Honor again ordered him to

comply, and he still hasn't complied. And after we discussed it today and now he's open to using an ESI vendor, but this could have been resolved months ago without the need for your Honor. But that's what we suggested, that he go to see an ESI vendor to get these documents searched, and he didn't. Unfortunately, then we had to come to court again to get any sort of resolution on this. So for those reasons --

THE COURT: You want his answer stricken, his answer to your counterclaims?

MS. BENNER: Correct.

THE COURT: All right. I hear the words. I understand that. All right. Anything else? I don't mean to cut you off.

MS. BENNER: No, your Honor.

THE COURT: Mr. Kleinman, tell me why that's crazy.

MR. KLEINMAN: Well, I think striking the answer would be really egregious because it would remove from my client any attempt to defend this action. OK? And I think that, again, if your Honor, and it was deemed decided I filed my motion and you decide that you deny it, OK, and whatever other jurisdictional, whatever other procedural issues I might follow as a result of that, and this does go through discovery and there is a trial. And I just don't think, Judge, that they're going to be able to show that they have the damages that they wish to sustain. So I think that striking his answer is really

egregious and goes beyond what's necessary here.

THE COURT: What is necessary, sir?

MR. KLEINMAN: Well --

THE COURT: There was a deadline. You've clearly blown past it. You know that you have, and you haven't yet given me a good excuse.

MR. KLEINMAN: I haven't given you a good excuse, Judge, no. No.

I mean I could beg the Court's indulgence for an additional ten days in which to respond, but that's entirely -- because that violates -- that's in violation -- well, that's not in violation of the Court's order, but that currently there's a violation of the Court's order, but that's --

THE COURT: I want to know how all depositions are going to be done on or before April 11. That's not going to happen.

MR. KLEINMAN: No.

THE COURT: No, because there's no discovery, because it hasn't been produced.

MR. KLEINMAN: Right. And I don't know how that would take place on or before April 11. And I haven't -- I think I may have received a notice, the EBT notice, but there was no date on it. So I mean it's obviously not going to take place.

THE COURT: Right, but that also seems bad.

My point, sir, is I do not know how to get you and

your client to comply with my orders. I don't. That's where we are.

MR. KLEINMAN: OK.

THE COURT: All right. We've been here a while. I need about five or ten minutes, because we have a couple of issues and I want to actually give you some decisions on these issues. So I'm going to ask for your patience for about five or ten minutes. My apologies to madam court reporter that we're still here. Sorry.

Let me ask friends at the front table to order this transcript. I'll be back as soon as I can. If you need to stretch your legs in the five minutes, you can.

Thank you.

(Recess)

THE COURT: There are three issues for me to discuss this afternoon, and I will discuss them in the order that we've been talking about them, beginning with the issue of sanctions.

I've talked to the parties about the *Agiwal* case. I've talked to counsel about the bases that I have, inherent powers I have and other bases for sanctions here that I'm being asked to impose based on inherent powers. And as I'm about to describe, I will be imposing sanctions for the recent postings of Mr. Johnson.

Let me say this. What I haven't really considered is the exchange with the reporter, because I don't know precisely

what was published. I believe it's behind a pay wall. And while there are some unfortunate comments, I don't have enough to think that it is worthwhile. But let me back up a moment and talk about the issues that I've been wrestling with or at least considering in the context of sanctions.

Mr. Kleinman has very wisely and consistently discussed First Amendment issues, and I have thought about that at some length. And that is why I have been as careful as I have in the past. But the First Amendment does not foreclose defamatory statements or court sanctions for them. It does not protect against false statements to me, hate speech. And I do believe it gives way when the statements are being used, as they are here, to subvert and undermine the remaining litigation before me. And to suggest, with no evidence and no basis in reality, that somehow the litigation that Mr. Johnson commenced is itself part of a broader scheme to silence Mr. Johnson, in which this Court has been co-opted by the other side to silence him, I think that's just ridiculous. I'm not going to stand by and let Mr. Johnson poison the well of this case, the jury pool and other things, by misstating what's happening here.

This case is in bad enough shape because of his conduct. The record is also clear that I've repeatedly tried to prevent Mr. Johnson from digging himself into deeper holes. I tried to talk to Alston & Bird. They tried to tame his baser

instincts and to check his more racist and anti-Semitic impulses. I've given him second, third, fourth chances. I've tried to be as direct as I could. I've required in-person appearance precisely so that I can tell him what is of concern to me. Mr. Johnson does not care, and I've made clear today my continuing frustration with plaintiff's complete refusal to comply with my orders in this case.

Talking first about the first article, which I believe was posted on February 20, it makes clear Mr. Johnson's willfulness because he begins by explaining his lack of intention from the start to abide by my orders. He made that first clear in the first paragraph by discussing it and directing it to me. He claims that it is because the public has a right to know what is going on. But there's a decided absence of any evidence of malfeasance, as he calls it. And therefore, there's not much whistle-blowing going on here. There is just innuendo and invective. There's a decrying of Mr. Lambert. There's a decrying of Clearview's public relations representative. There's a suggestion that I'm somehow part of a scam.

Then there are quotes from a biometric update article that repeats what I believe to be a wholly refuted statement, that somehow you have handling agents who were operating at the behest of DHS. Basically that whole article just sort of throws out names, throws out some rumors and attempts to

connect dots that cannot logically be connected. But even then I warned plaintiff. I told him to adhere to my order. But did he? No, of course not.

There's the March 5 article, and that's just a complete return to old habits. Somehow a conversation about Turkey became a declination of Mr. Giller, and to announce "I won't be gagged when I'm whistle-blowing" is a wonderful statement except for the absolute absence of evidence of whistle-blowing. More than that, even if there were problems with Clearview, and of course, I've seen no evidence of same, there's absolutely no basis to go after Mr. Giller in the article.

As you can tell from my discussions with Mr. Kleinman, I especially loved the "take the L" comment, because that was just A list projection. Mr. Johnson is either lying to me or has been misled to an embarrassing degree about the information he is receiving about Clearview. There's more mudslinging. There's no point. There certainly is not proof of the foreign influence that you ascribe to Mr. Giller.

So my problem has been that there has been just consistent violation of my orders over a period of months despite written warnings, despite oral warnings. And therefore, unfortunately, my efforts to do something less than sanctions have not worked, and sanctions are warranted.

With respect to the first article, which again, I

believe, is dated February 20, I am imposing a monetary sanction of $2,000 to be paid to defendants within 30 days. I would consider halving that amount if the posting were removed from SubStack, but I'm not pushing for its removal. I'm happy to sanction him on that basis.

With respect to the March 5 posting, which came after another warning from the Court, I am imposing a sanction of $5,000 to be paid to defendants within 30 days. And I want to make clear if there are additional postings that violate my prior orders, the next set of penalties will be substantially higher and almost certainly will involve a default judgment against Mr. Johnson on the counterclaims or the striking of the answer or some equivalent. The case will end.

With respect to the issue of discovery, I am again just devastated because we had so many discussions. I wrote that order myself, and I thought it was pretty clear. But apparently it could not be abided by.

Mr. Kleinman, I will take your generous offer of ten additional days from today -- I'll give you two weeks from today, so ten business days -- to respond to the supplemental requests of the parties.

With respect to the ESI schedule, I will reset that schedule as follows:

May 16 is the date for the production of all documents and discovery and for the production of the logs.

June 6 is the date by which depositions are to be completed.

Again, let me say this on the discovery issues.

Under Rule 37, I am well within my rights to impose sanctions here. I will do it in this manner:

If there are further violations of the discovery schedule that I have just set, I will impose a monetary sanction on plaintiff, if he is responsible for the discovery violations, that approximate what I believe the legal fees are for all of these discovery issues. And as well I will strike the answer or I will enter a default judgment. That is, I don't want to say a certainty because I don't like to box myself in, but it is a near certainty that further discovery violations and further violations of my orders will result in default against Mr. Johnson in this case, because I've run out of things that I can do to get him to abide by my orders.

That leaves us now with the 12(b)(1) motion.

Mr. Kleinman, I will, of course, let you file it, and I will consider it very carefully, because you and I both will be looking at the Illinois decision. My very thoughtful law clerk, who has reviewed the decision while we've all been talking -- because this conference has been that long -- is of the view that it doesn't impact any of our matters, but we'll find out. Maybe. Perish the thought, she could be wrong. I doubt it, but she could be wrong. I will let you submit that

motion, sir.

I just want to tell my friends at the back table, I don't know what the motion's going to look like. And yes, I will want a response from you, but I will understand if your response is "see our premotion letter" or that it's just a cut and paste of your premotion letter into another brief with a few more sentences. I'll let him file it. I'll let you respond as you see fit. I don't know. I need to see what is submitted, but I'm just saying if you believe that a shorter response is warranted, I will accept your shorter response.

Mr. Kleinman, sir, what time would you like to file your motion papers, sir?

MR. KLEINMAN: I think I could have my motion filed by the 11th of April, Judge.

THE COURT: OK.

MR. KLEINMAN: I would like to get this issue resolved as quickly as possible.

THE COURT: Of course.

OK. Thank you, sir.

MR. KLEINMAN: And -- oh, sorry.

THE COURT: I was just going to ask for the opposition. Was there something you wanted to say before I do that?

MR. KLEINMAN: No, no, no. I mean I would assume that -- I mean three weeks is the normal, but I don't know how

much time, if they're just going to cut and paste their letter --

THE COURT: Of course. I don't know. They, of course, don't know what you're writing so they don't know what they're responding to. But let me ask Ms. Benner.

Ms. Benner, how much time do you need to respond? Three weeks? May 2?

MS. BENNER: Three weeks, your Honor.

THE COURT: May 2.

And then May 9 for reply, Mr. Kleinman.

MR. KLEINMAN: One week? Yeah, that's not a problem, Judge.

THE COURT: OK. That's the motion to dismiss schedule.

All right. Mr. Kleinman, sir, from your perspective, is there anything that I have failed to address in today's conference?

MR. KLEINMAN: I don't believe so.

Just is there a date that you're going to want everybody to come back, or do you want to wait and see what happens, or what?

THE COURT: When I get the motion papers is when I think I'd be setting the next conference, sir. I have some dates here already. I've got dates for your motion to dismiss. I've got dates for discovery.

MR. KLEINMAN: Right.

THE COURT: And we'll probably do another order just to get that out there in writing.

In terms of seeing the parties again, I think I'd like to have the motion to dismiss fully briefed. And I'm going to tell myself that there will be no problems in discovery so we won't have to have you in for a conference on discovery violations.

MR. KLEINMAN: Your mouth to God's ears.

THE COURT: Mr. Kleinman, just before you sit down, sir, is there anything that I have said this afternoon that is in any way unclear?

MR. KLEINMAN: No. I believe that your schedule and your decision is clear. I understand it. I might take exception to the sanctions, but that's certainly within your purview as an Article III judge to make that determination. I do take exception on behalf of my client to the sanctions.

THE COURT: OK. Understood. Thank you.

Ms. Benner, have I omitted anything that you wanted me to address this afternoon?

MS. BENNER: No, your Honor. Thank you.

THE COURT: And is there anything about any of the decisions that I've made this afternoon that is unclear to you or to Mr. Giller?

MS. BENNER: No, your Honor.

THE COURT: OK.

MR. KLEINMAN: I'm sorry to interrupt, Judge. I have a brief question.

THE COURT: Please, sir.

MR. KLEINMAN: On just a practical level, how would my client pay the sanction? I mean do you know how that is --

THE COURT: I think it would be a check going to the firm. Mr. Giller will accept a check.

Mr. Giller, how would your client like to receive this money, or do you want to have that talk off-line with Mr. Kleinman?

MR. GILLER: Any way other than bags of cash, your Honor, would be fine.

THE COURT: Mr. Kleinman.

MR. KLEINMAN: I didn't understand.

THE COURT: Any way other than bags of cash.

MR. KLEINMAN: I won't respond to that.

THE COURT: No, of course you won't.

Mr. Kleinman, speak to Mr. Giller. He'll give you whatever instructions you will need.

MR. JOHNSON: Your Honor --

THE COURT: Mr. Johnson.

MR. JOHNSON: If it's possible, I'd like to say something very quickly. Is that --

THE COURT: Sir, yes.

MR. JOHNSON: So, I just want to, you know, apologize to the public and to the Court for being involved with this in the first place.

THE COURT: All right.

MR. JOHNSON: I was stupid and wrong about a lot of things in this case and about this company, and I should never have filed, should never have gotten involved in this company. And if I were a normal person I wouldn't have found myself in this place in the first place, and I'd like that apology to be on the record.

When I started this, I was pretty young, and I hope age brings wisdom, but I know the Court's time is limited and I know that every second I take on these stupid mistakes of my own, that that's something that is addressed by other people. And so I want to apologize.

THE COURT: Thank you, sir. It is on the record.

MR. JOHNSON: Thank you.

THE COURT: All right. Go forth, everyone.

Thank you very much.

(Adjourned)